



WSBA

OFFICE OF LEGISLATIVE AFFAIRS

MEMORANDUM

TO: Interested Stakeholders

FROM: Kathryn Leathers, WSBA Lobbyist

RE: 2012 Escrow Licensing Legislative Proposal_Explanatory Memo

DATE: December 30, 2011

The purpose of this memo is to provide a brief explanation of the need for the Washington State Bar Association's (WSBA) 2012 legislative proposal related to escrow licensing requirements for attorneys, Z-0716.1.

In 2010, the Legislature enacted ESHB 2564, a bill related to escrow agents and their licensing requirements, at the request of the Department of Financial Institutions (DFI). Except as provided specifically in statute, all escrow agents must be licensed by the DFI and the DFI has the duty to enforce all laws and rules relating to the licensing of escrow agents and escrow officers.

Prior to enactment of ESHB 2564, the escrow licensing requirements of RCW 18.44 did not apply to "any person licensed to practice law in this state while engaged in the performance of his or her professional duties." As it relates to the attorney licensing provision, **ESHB 2564 amended the attorney exemption as provided below (underscored language):**

Sec. 2 RCW 18.44.021 and 1999 c 30 s 2 are each amended to read as follows:

It shall be unlawful for any person to engage in business as an escrow agent by performing escrows or any of the functions of an escrow agent as described in RCW 18.44.011(4) within this state or with respect to transactions that involve personal property or real property located in this state unless such person possesses a valid license issued by the director pursuant to this chapter. **The licensing requirements of this chapter shall not apply to:**

...

(2) **Any person licensed to practice law in this state while engaged in the performance of his or her professional duties: PROVIDED, That no separate compensation or gain is received for escrow services, and the service is provided under the same legal entity as the law practice. Any attorney who is principally engaged as an escrow agent is required to be licensed. If an attorney holds himself or herself out publicly as being able to perform the services of an escrow agent, he or she is principally engaged as an escrow agent.**

...

(emphasis added)

It is the position of the WSBA that the “principally engaged” and “holding out” language in ESHB 2564 is ambiguous and has caused some confusion among attorneys whose practices include providing escrow-related services. The ambiguity also resulted in some concern that attorneys who provide escrow services as part of their practices are subject to DFI’s enforcement and regulatory powers, a violation of the separation of powers doctrine because attorneys are regulated by the Supreme Court.

It is the WSBA’s understanding that the 2010 change to the attorney licensing exception was intended to allow DFI to pursue and regulate escrow companies which functioned as, and were advertised as, an escrow company, but attempted to shield themselves from regulation because of its ownership by an escrow attorney. The WSBA agrees that escrow companies may not hide behind an attorney’s license.

In response to this legislation, a WSBA task force was formed to review the language, and the task force was ultimately directed to work with the DFI to draft language that would address both the practitioners’ concerns and the DFI’s concerns. **This effort has been successful. This proposal was jointly drafted by, and has the support of, both the WSBA and the DFI.** In addition, this proposal has also been reviewed by the Washington Escrow Association, and the WEA has confirmed that they have no objection to the proposal.

Agreed upon proposed language:

~~(2) Any person licensed to practice law in this state ((while engaged in the performance of his or her professional duties: PROVIDED, That no separate compensation or gain is received for escrow services, and the service is provided under the same legal entity as the law practice. Any attorney who is principally engaged as an escrow agent is required to be licensed. If an attorney holds himself or herself out publicly as being able to perform the services of an escrow agent, he or she is principally engaged as an escrow agent)) if:~~

(a) All escrow transactions are performed by the lawyer while engaged in the practice of law, or by employees of the law practice under the direct supervision of the lawyer while engaged in the practice of law;

(b) All escrow transactions are performed under a legal entity publicly identified and operated as a law practice; and

(c) All escrow funds are deposited to, maintained in, and disbursed from a trust account in compliance with rules enacted by the Washington supreme court regulating the conduct of lawyers.

Memo

TO: WSBA Board of Governors and WSBA Task Force on Escrow Licensing
Legislation
FROM: Nancy Isserlis/DFI Task Force
RE: Proposed Legislative Change
DATE: 9/9/2011

The WSBA Task Force on Escrow Licensing Legislation ("DFI Task Force") was charged with the task of developing proposed language for corrective legislation with respect to RCW 18.44, the Escrow Agent Registration Act (Act). For those new to the Board, a brief overview might be helpful so that you can understand the proposal that the DFI Task Force is bringing forward.

Except as provided specifically in statute, all escrow agents must be licensed by the Department of Financial Institutions (DFI). The DFI has the duty to enforce all laws and rules relating to the licensing of escrow agents and escrow officers. In 2010, the DFI introduced HB 2564, a proposal that made numerous changes to escrow licensing and bonding requirements, prohibited activities, and enforcement provisions. The change in HB 2564 that is of interest to the WSBA's DFI Task Force relates to RCW 18.44.021(2), the exception to licensing requirements for attorneys.

Prior to enactment of HB 2564, the licensing requirements of RCW 18.44 did not apply to "any person licensed to practice law in this state while engaged in the performance of his or her professional duties." Effective June 10, 2010, ESHB 2564 amended the attorney licensing exception to establish, among other things, that "any attorney who is principally engaged as an escrow agent" must be licensed by the DFI. These changes allow DFI to regulate attorneys who provide escrow services without being licensed under the Act. In furtherance of the amendment to RCW 18.44.021(2), the DFI issued a rule with respect to the attorney exception, which became effective November 5, 2010, which attempted to include a clarification with respect to law firms, employees and agents (WAC 208-680-045). The rule has resulted in some confusion.

It is our understanding that the 2010 change to the attorney licensing exception was intended to allow DFI to pursue and regulate escrow companies which functioned as and were advertised as an escrow company, but attempted to shield themselves from regulation because of its ownership by an escrow attorney. The 2010 change was perceived by a number of our members as an unconstitutional regulation of the practice of law. This group met with the Board of Governors, requesting that the Board sue the DFI. The Board of Governors, after careful consideration, declined to do so, but charged the DFI Task Force with drafting a possible legislative fix to address the concerns of this group, while continuing to allow DFI to regulate what it believes to be its public policy mandate to protect the public from unscrupulous escrow companies.

The DFI Task Force believes that we will have a specific amendment to bring to the BOG in the context of our slate of legislative initiatives that we will consider later this fall, but we wanted to give you a heads up to consider this at this time.

The simplest change which we believe solves the problem, and which was offered to DFI as an alternative, would remove all of the new language adopted in 2010 and would edit the original statute and exemption as follows (proposed new language is underscored):

"(2) Any person licensed to practice law in this state while engaged in the performance of his or her professional duties: Provided, that the escrow service is performed under a legal entity publically identified and operated as a law practice."

We submitted that language to DFI for its consideration and it proposed the following suggestion, essentially adding subsection (3) below to our proposal:

"Any individual licensed to practice law in the state if: (1) the attorney is engaged in the practice of law; (2) all escrow transactions are performed under a legal entity publically identified and operated as a law practice; and (3) all escrow funds are deposited, maintained and disbursed from a trust account subject to audit by the Washington State Bar Association."

As of the dictation of this memo, the DFI Task Force has not had a chance to review and discuss the alternate language proposed by DFI, but we intend to and I will bring the Board of Governors up to speed at our September meeting.

Some additional information that you should know. I have confirmed with the DFI that there have been thirty-five (35) attorneys who have requested "no action" letters from DFI, which means that DFI has reviewed their application and has found that they are operating within the confines of the practice of law and therefore need not be regulated by DFI. It is my understanding that all attorneys who have requested a no action letter have in fact received one from DFI.

I have also been requested to bring to the BOG's attention the very real concerns that some members of the DFI Task Force have with respect to the constitutional issues raised by ESHB 2564, and the need to maintain the proper separation of powers. While a group of lawyers did file a lawsuit and asked for direct review by the Supreme Court, the Court declined to take the case on a Petition for Direct Review, and suggested that the parties go through Thurston County Superior Court to begin the constitutional challenge. Rather than engage in further litigation, the group decided to work with the WSBA to see if a legislative fix could be developed. The DFI Task Force has worked through a number of difficult issues, and a number of disparate viewpoints on this very important topic.

We believe that between now and our December meeting when we adopt the WSBA legislative agenda for the upcoming legislative session that the DFI Task Force will have agreed language with DFI. At this time, although we have no written commitment from DFI, discussions with

their director and staff have been very positive and we believe they will likely support the legislation as proposed.